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No. 10-754

Supreme Court, U.S.
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In The
Supreme Court of the United States

NATIVE WHOLESALE SUPPLY,
a Corporation Chartered by the
Sac and Fox Tribe of Oklahoma,

Petitioner,

v.

STATE OF OKLAHOMA,
ex rel., W.A. "DREW" EDMONDSON,
ATTORNEY GENERAL OF OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

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RESPONDENT STATE OF OKLAHOMA'S COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Oklahoma Supreme Court erred in finding the State's Second Amended Petition asserted sufficient jurisdictional facts to meet either a "purposeful direction" or the more restrictive "purposeful availment" standard for personal jurisdiction.

2. When a member of the Seneca Nation of New York forms a private, for profit corporation under the laws of a separate Indian Tribe, the Sac and Fox Tribe of Oklahoma, and the corporation operates its business from the Seneca Reservation in New York, imports cigarettes from a Canadian cigarette manufacturer, stores the cigarettes on non-Indian lands in Nevada, and then sells and arranges for the delivery of those cigarettes to a third Indian Tribe, the Muscogee Creek Nation of Oklahoma, for resale to non-tribal member consumers in Oklahoma, does the Indian Commerce Clause bar State taxation and regulation of those sales, under a "Nation to Nation" Intertribal Commerce theory?

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STATEMENT OF THE CASE

Plaintiff State of Oklahoma, ex rel., W.A. "Drew" Edmondson, filed this civil action in the District Court of Oklahoma County, State of Oklahoma against Native Wholesale Supply ("NWS") seeking injunctive relief and disgorgement and payment to the State of the gross proceeds realized by NWS from cigarette sales made in violation of the Oklahoma Tobacco Master Settlement Agreement Complementary Act, 68 O.S. §§360.1, *et seq*.

NWS filed a Motion to Dismiss for lack of personal jurisdiction and subject matter jurisdiction. The court denied NWS' challenge to personal jurisdiction but granted its challenge to subject matter jurisdiction under the Indian Commerce Clause. The State of Oklahoma was granted leave to amend its Petition. The State filed an Amended Petition and shortly thereafter a Second Amended Petition asserting additional factual allegations. The District Court, without conducting an evidentiary hearing, found the State in its Second Amended Petition had made a prima facie showing of personal jurisdiction and denied defendant's Motion to Dismiss for lack of personal jurisdiction. The Court, however, granted defendant's Motion to Dismiss for lack of subject matter jurisdiction under the Indian Commerce Clause.

The State of Oklahoma appealed the trial court's Order dismissing this case for lack of subject matter jurisdiction under the Indian Commerce Clause. NWS filed a Counter-Petition in Error asserting that

the trial court erred in denying its Motion to Dismiss for lack of personal jurisdiction.

The Oklahoma Supreme Court sustained the District Court's finding that it had personal jurisdiction over NWS and reversed the District Court determination that the Indian Commerce Clause barred the State's cause of action.

SUMMARY OF THE ARGUMENT

Neither of the Questions Presented by NWS merits this Court's plenary review under the standards of Sup.Ct. R. 10. The first Question Presented is based on a false premise – that the Supreme Court of Oklahoma adopted a "'purposeful *direction*' specific jurisdiction standard" rather than a "purposeful *availment*" standard, thereby supposedly creating a conflict with decisions of this Court and the federal Courts of Appeals. *See* NWS Petition for Writ of Certiorari ("Pet.") at 10-11 (emphasis added). The court below did no such thing. To the contrary, it emphasized that it did not need to choose between these standards "because Native Wholesale Supply has engaged in conduct that satisfies even the rigorous criteria advocated by Justice O'Connor" in her plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987) – namely, the "purposeful availment" standard. *See* Pet. App. at 14a.

The Oklahoma Court's application of the purposeful availment standard to the facts of this case is

manifestly correct, and certainly presents no cert-worthy issue. Contrary to NWS' claim that the contracts in issue here were "entered into . . . and fully performed *outside*" Oklahoma (Pet. at I, emphasis added), the record evidence overwhelmingly demonstrates that NWS has (1) directly and repeatedly solicited business from tribes in Oklahoma, including personal sales trips to the State by both its President and National Sales Manager; (2) created an elaborate distribution system for delivering cigarettes into Oklahoma; and (3) arranged to channel *hundreds of millions* of contraband cigarettes into the State. As emphasized by the court below, "[t]o claim, as Native Wholesale Supply does, that it does not know, expect, or intend that the cigarettes it sells to [Oklahoma tribal wholesalers] are intended for distribution and resale in Oklahoma is simply disingenuous." Pet. App. at 18a; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) ("parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities"). As demonstrated below, many of NWS' denials of jurisdictional contacts with Oklahoma are not only "disingenuous," but downright false and misleading.[1]

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[1] This Court should be aware that NWS recently pled guilty to federal obstruction-of-justice charges that grew out of very similar misrepresentations it made to a federal court about its supposed lack of jurisdictional contacts with the State of

(Continued on following page)

The second Question Presented fares no better. It rests entirely on the false premise that a tribe and its members located in one State have a protected right under federal Indian law to purchase and bring into the State goods from *other* Indian tribes in *other* States, free of any state taxation or regulation.[2] *See* Pet. at 10 (claiming immunity for "purely Indian commerce"), 25-34. This Court has repeatedly rejected such claims to "intertribal immunity" from state taxation and regulation. *See, e.g., Duro v. Reina,* 495 U.S. 676, 686-87 (1990); *Rice v. Rehner*, 463 U.S. 713, 720

Washington. Many of the false statements that NWS and its President, Mr. Montour, made in the Washington litigation are virtually *identical* to several of the key jurisdictional denials that NWS and Montour have made in the present litigation. *See United States v. Montour*, No. CR 0900214MJP, 2010 WL 3211888, at **1, 3-4 (W.D. Wash. Aug. 12, 2010) (detailing the "false statements to the Court" that formed the basis for the obstruction-of-justice count). The penalties imposed on NWS for making these false jurisdictional statements included forfeitures totaling $1 million, 5 years probation, additional "criminal monetary penalties," and stringent injunctive relief. *See* Sept. 10, 2010 Judgment in a Criminal Case in *United States v. Montour*.

[2] Although NWS is owned by a member of the Seneca Nation of New York and located on that Reservation, it is chartered by the Sac and Fox Tribe of Oklahoma. The Sac and Fox Tribe of Oklahoma entered into a Tobacco Compact with the State of Oklahoma. Under that Compact all tobacco sales, including tribal member sales, are subject to a reduced State excise tax. The Compact further provides that all tobacco products sold by tribal retailers must be from MSA compliant manufacturers who must fund an Escrow Account for those Sales. *See* Oklahoma Secretary of State, Executive Legislation Division, File No. 39638, filed on March 26, 2004. NWS has complied with none of these requirements.

& n. 7 (1983); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980).

There is no reason to depart from this clear precedent here. There is no split among lower courts on this point. Indeed, as one Oklahoma federal court recently emphasized in rejecting this identical claim, "the Supreme Court has repeatedly held that Native American immunities from state taxation and regulation only extend to commerce *within* a particular tribe, not to commerce *among* different tribes or their members," and a contrary rule "would truly be unprecedented." *Muscogee (Creek) Nation v. Henry*, Civ. No. 10-019-JHP 2010 WL 1078438, at **3-4 (E.D. Ok. Mar. 18, 2010).

STANDARD OF REVIEW ON MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION WHERE NO EVIDENTIARY HEARING IS HELD

A court may address a motion to dismiss for lack of *in personam* jurisdiction prior to trial based solely on documentary evidence or by holding a hearing. If the court decides the motion only on the documentary evidence, the plaintiff need only demonstrate a prima facie showing of personal jurisdiction to defeat the motion. Allegations of the complaint must be accepted as true to the extent that they are not contradicted by the defendant's competent evidence. If the parties

submit conflicting evidence, all factual disputes are resolved in the Plaintiff's favor. *See Powers v. District Court*, 227 P.3d 1060, 1066-67 (Okl. 2009).

COUNTER-STATEMENT OF FACTS

The affidavit that NWS submitted to the District Court in support of its motion to dismiss for lack of personal jurisdiction was controverted by extensive documentary evidence submitted to the court by the State. Specifically, the State submitted the following documents:

1. The State submitted documents demonstrating NWS was storing its cigarettes in Oklahoma including a document titled "Notice Of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction" of 568 cases of cigarettes, dated April 10, 2007, which NWS had stored at a warehouse in Catoosa, Oklahoma. This notice was signed by NWS' designated agent in fact in Oklahoma, Eric Johnson.

2. A Certificate of Disposal, dated May 31, 2007, by Waste Management of Oklahoma, Inc., affirming that the 568 cases of abandoned or forfeited cigarettes were buried in a land field located in Tulsa, Oklahoma.

3. A UCC Financing Statement dated June 28, 2006 given by NWS to Upstate Bank in Rochester, New York pledging collateral located at UPS Supply

Chain Solutions, 5445 N. Bird Creek Avenue, Catoosa, Oklahoma 74015, and other locations.

4. Exemplar Bills of Lading, Invoices, Warehouse Withdrawal Forms and cancelled checks revealing that NWS created a distribution center for its cigarettes located off of Indian land in Las Vegas, Nevada. This evidence demonstrated that NWS arranged, paid for and directed the shipping of its cigarettes to MCN Tobacco Wholesale located in Okmulgee, Oklahoma.

5. NWS is the importer and trademark holder for Seneca brand cigarettes.[3] An affidavit from Clint Long, of the Oklahoma Tax Commission, documented the seizure of more than 10,000 packs of Seneca brand cigarettes from smoke shops located off of Indian land. The affidavit also described the Seneca cigarette marketing campaign as displayed in one of the smokeshop's windows. Photographs of the campaign were attached to his affidavit. The photographs reveal that on May 2, 2008, NWS awarded prizes to a winning store, customer and cashier in Oklahoma. These prizes included a Plasma television, and $5,000.00 in cash. In a second contest from October 6, 2008, to December 8, 2008, NWS awarded a first prize of $10,000.00, a second prize of $5,000.00, and a

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[3] *See* NAFTA AWARD, http//www.state.gov/documents/organization/156820.pdf, and *Native Wholesale Supply, et al. v. Campbell Wholesale*, Case No. 03-CV-065, U.S. District Court, Northern District of Oklahoma (March 10, 2003).

third prize of $2,500.00, in Oklahoma as noted by the photographs attached to the affidavit.[4]

6. The Agenda for a "Tobacco Forum" held on November 12, 2008, at the Muscogee Creek Nation where Arthur Montour, President of NWS and its National Sales Manager, Kim Porter, as well as the President of Grand River Enterprises were listed as giving a presentation on the Master Settlement Agreement.[5]

The following facts contained in the State's Second Amended Petition are treated as true in respect to a ruling on NWS' jurisdictional challenge:

1. NWS stored cigarettes in a warehouse located in Oklahoma until April 10, 2007, when it abandoned 568 cases of cigarettes that were subsequently buried in an Oklahoma land field. Amended Petition ¶18.

2. On February 22, 2008, the Oklahoma Tax Commission seized 189 full cases and 19 half cases of contraband Seneca brand cigarettes that NWS

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[4] Arthur Montour, the sole owner of NWS, testified in a NAFTA hearing that " . . . he made great personal efforts to promote on reservation sales of Seneca cigarettes . . . The evidence also shows that NWS expended large sums to promote the brand, paying for advertising, distribution of promotional goods, drawings, and the like."

See NAFTA AWARD, http//www.state.gov/documents/organization/156820.pdf.

[5] Although not available at the time, the State has now been provided with an audiotape of the forum presentations.

shipped to Bowen Wholesale, located in the State of Oklahoma. Amended Petition ¶19.

3. On February 29, 2008, the State of Oklahoma seized a number of cases of Seneca Brand Cigarettes from Norman Edward Enyart, Jr., an individual operating an internet pharmacy and smokeshop off of Indian land. Amended Petition ¶20.

4. Records from Bowen Wholesale showed the contraband tobacco products it possessed had been shipped by carrier from the Nevada International Trade Corporation, a Foreign Trade Zone ("FTZ") located in Las Vegas, Nevada. Records subpoenaed from the carrier and the Nevada FTZ revealed that from or about February, 2007, through October, 2008, NWS had also knowingly and unlawfully sold, distributed, acquired, held, owned, possessed, transported, imported, or caused to be imported for sale approximately 15,270 cases or 916,200 cartons of contraband Seneca Brand cigarettes manufactured by Grand River Enterprises to Muscogee Creek Nation Wholesale located in the State of Oklahoma. Amended Petition ¶21.

5. NWS had the cigarettes shipped from the manufacturer, Grand River Enterprises, in Canada to the Las Vegas FTZ. NWS, acting through a local Customs Broker in Las Vegas, then had the cigarettes released from the FTZ, and shipped to recipients in Oklahoma. NWS arranged with a common carrier for shipment of its product into Oklahoma, directed the carrier where to pick up and deliver the product, and

paid the shipping costs to have its product delivered into Oklahoma. At no time was the FTZ or carrier contacted by the recipient to arrange shipping. Amended Petition ¶22.

6. On October 15, 2008, the Oklahoma Tax Commission seized an additional 1,267 cartons of Seneca brand cigarettes from two cigarette retailers, located off of Indian land, which had been purchased from Creek Nation Wholesale. Window displays in these retailers, located off of Indian land, in Oklahoma reveal that NWS is marketing its Seneca brand cigarettes to consumers in Oklahoma through cash and merchandise giveaways which require product purchase. Amended Petition ¶23.

7. Arthur Montour, President of NWS, and Kim Porter, National Sales Manager of NWS, have personally traveled to Oklahoma to market their product to cigarette retailers doing business within the State of Oklahoma. Amended Petition ¶24.

8. Records from the United States Census Bureau show a population of 2,124 individuals, ages 18 and above, in Okmulgee County, Oklahoma who reported their heritage as Creek alone or any combination. A study by the Oklahoma Department of Health revealed the prevalence of cigarette smoking in the adult population of Native Americans in Oklahoma is 33 percent as compared to the general adult population rate of 23 percent. Native Americans in Oklahoma reported smoking, on average, about a half pack of cigarettes per day. Instead of an expected

consumption of 1 and one-half cartons of cigarettes per month, smokers of Creek heritage in Okmulgee County would have to exclusively smoke Seneca brand cigarettes at a rate of 98 and one-half cartons of cigarettes per month to consume the average of 1,149 cases of Seneca brand cigarettes shipped to Okmulgee County by NWS each month.[6] Amended Petition ¶25.

9. In December, 2008, investigators from the Oklahoma Attorney General's Office purchased Seneca and two other brands of contraband non escrowed, non-taxed cigarettes from smokeshops owned or licensed by the Muscogee Creek tribe of Oklahoma. No proof of tribal membership was required for the purchases. Statistically 98.5 percent of the sales of Seneca brand cigarettes by Muskogee Creek retailers in Okmulgee County are to non-tribal members. Amended Petition[7] ¶26.

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[6] Based upon evidence available at the time. The United States District Court for the Eastern District of Oklahoma in *Muscogee (Creek) Nation v. Henry*, 2010 WL 1078438, found that the State of Oklahoma lost close to thirteen million dollars in tax revenues from these sales in calendar year 2009 alone. This equates to twenty-six million cigarettes per month or 260 million cigarettes per year. In 2009, smokers of Creek heritage in Okmulgee County would have had to smoke 183.61 cartons of Seneca brand cigarettes per month to consume the amount of cigarettes shipped into Okmulgee County.

[7] NWS presented no evidence that any of the cigarettes it sold and caused to be transported to Muscogee Creek Nation Wholesale were purchased by members of the Muscogee Creek tribe.

The Petition for Certiorari, at pp. 5-6, contains many misstatements as to how Escrow Statutes and Complementary Statutes function. For example, the Participating Manufacturers ("PMs") do not share their profits with the State. Instead, under the Master Settlement Agreement they make a per-cigarette payment to the State based upon Federal Excise Taxes paid. Oklahoma does not protect the PMs' market share, by enforcing its Escrow Statute. Instead, the purpose of the escrow account is " . . . to guarantee a source of compensation and to prevent [non-participating] manufacturers from deriving large, short term profits and then becoming judgment proof before liability may arise." *See* 68 O.S. §360.4.

NWS claims that Oklahoma prohibits the sale of cigarettes by companies that do not contract with the State. There is no such requirement. The Attorney General maintains an online directory of all tobacco manufacturers that are in compliance with the MSA or escrow statutes. Non-compliant tobacco manufacturers are not listed on the directory and a stamping agent cannot affix a tax stamp, which is required for lawful cigarette sales, to any cigarette package of a manufacturer not listed in the directory. *See* 68 O.S. §360.4(B); and 68 O.S. §360.8(A).

Unlike the "Escrow Statute" which applies only to Tobacco Product Manufacturers, complementary legislation makes it unlawful for any person to: acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in

the state in violation of the Master Settlement Agreement Complementary Act. Title 68 O.S. §360.7(E). The purpose and effect of these statutes are explained in detail in Plaintiff's Second Amended Petition.

REASONS FOR DENYING THE PETITION

PROPOSITION I

THE OKLAHOMA SUPREME COURT'S PURPORTED APPLICATION OF THE "PURPOSEFUL DIRECTION" SPECIFIC JURISDICTION STANDARD INSTEAD OF A "PURPOSEFUL AVAILMENT" JURISDICTION STANDARD IS IRRELEVANT AS TO WHETHER THIS COURT SHOULD GRANT NWS' PETITION FOR CERTIORARI BECAUSE THE OKLAHOMA SUPREME COURT RULED NWS HAS SUFFICIENT CONTACTS WITH THE STATE OF OKLAHOMA TO SATISFY EITHER JURISDICTIONAL STANDARD.

A. The State's Cause of Action Against NWS Is Not a Contract Based Cause of Action.

The Petitioner, in a difficult to follow argument, claims the Oklahoma Supreme Court erred in applying a tort based, instead of contract based jurisdictional standard. The State's Second Amended Petition asserted cause of action against NWS is clearly not based upon contract but is a tort based cause of action. Under Oklahoma law:

> A contract is an agreement between two or more persons which creates an obligation to do or not do a particular thing; its essentials are parties capable of making a contract, their consent, a lawful object, and sufficient cause or consideration.

15 O.S. §§1 and 2 (2001).

A tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. *See Patterson v. Beall*, 947 P.2d 617, 619, 1997 Okla. Civ. App. 64, ¶8 (citations omitted).

This action was brought against NWS for violation of the Master Settlement Agreement Complementary Act, 68 O.S. §§360.1 *et seq*. The Complementary Act provides that selling, offering, or possessing for sale cigarettes that are not on the Attorney General's Directory is a deceptive trade practice under the Oklahoma Consumer Protection Act. *See* 68 O.S. 360.7. Committing an unfair or deceptive trade practice is a tort. *See Patterson v. Beall*, 947 P.2d 617, 619, 1997 Okla. Civ. App. 64, ¶9. The remedy for a violation of the act is a disgorgement of the gains NWS received from violation of the Act.[8]

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[8] Contrary to Petitioners' assertions the Seneca brand cigarettes it shipped into Oklahoma were not "legal" cigarettes. First, these cigarettes are illegal because they did not bear the excise tax stamp of the State. Second, they are illegal because they are from a non escrow compliant tobacco product manufacturer whose brands had been banned from being shipped into or sold within the State of Oklahoma.

B. The Oklahoma Supreme Court Specifically Held That NWS' Contacts With the State of Oklahoma Were Sufficient to Meet a "Purposeful Availment" Standard.

The Petitioner argues that the Supreme Court of Oklahoma adopted a "'purposeful *direction*' specific jurisdiction standard" rather than a "purposeful *availment*" standard, thereby supposedly creating a conflict with decisions of this Court and the federal Courts of Appeals. Pet. at 10-11 (emphasis added). The court below did no such thing. To the contrary, it emphasized that it did not need to choose between these standards "because NWS has engaged in conduct that satisfies even the rigorous criteria advocated by Justice O'Connor" in her plurality opinion in *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987) – namely, the "purposeful availment" standard. *See* Pet. App. at 14a.

The Oklahoma Court's application of the purposeful availment standard to the facts of this case is manifestly correct. Contrary to NWS' claim that the contracts in issue here were "entered into . . . and fully performed *outside*" Oklahoma (Pet. at I, emphasis added), the record evidence demonstrates that NWS has directly and repeatedly solicited business from tribes in Oklahoma, created an elaborate distribution system for delivering cigarettes into Oklahoma, and arranged to channel *hundreds of millions* of contraband cigarettes into the State. As emphasized by the court below, "[t]o claim, as Native Wholesale Supply does, that it does not know, expect, or intend

that the cigarettes it sells to [Oklahoma tribal wholesalers] are intended for distribution and resale in Oklahoma is simply disingenuous." Pet. App. at 18a; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) ("parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities").

NWS has had significant, sizeable and purposeful contacts with the State of Oklahoma that are long lasting and justify personal jurisdiction under any jurisdictional standard, including the more restrictive "purposeful availment" standard argued by the Petitioner. The Second Amended Petition alleged that NWS directed the sale and shipments of more than 100,000,000 untaxed and non escrow compliant cigarettes per year into and through the State of Oklahoma to the Muscogee (Creek) Nation of Oklahoma. We now know that the true figure is almost 2 ½ times that amount. This alone should be sufficient to satisfy the Due Process clause's requirement of "minimum contacts" with the forum state.

In *Asahi*, 480 U.S. at 121-22 Justice Stevens presented a third view of "purposeful availment" which includes the consideration of the volume, value and hazardous character of the product at issue. The facts of this case even meet the third view held only by Justice Stevens. In this case the product is cigarettes, a highly regulated, and hazardous product. NWS profits from the high volume of its sale of cigarettes

from a non-compliant tobacco manufacturer to Oklahoma consumers by laundering its sales through tribal retailers licensed by the Muscogee Creek Nation. NWS is able to market cigarettes from the non-compliant manufacturer to Oklahoma residents at substantially lower costs than compliant manufacturers because these cigarettes are sold without payment of Oklahoma excise taxes and without the manufacturer funding an escrow account. NWS not only increases the volume of its sales, but its profits as well. Through the illegal acts of NWS, the State of Oklahoma not only loses millions of dollars of lost tax revenue but also suffers an increase in the number of Oklahomans, including juveniles, suffering severe illness and death with the corresponding increase in health care costs to the State of Oklahoma. Because there is no funded escrow account, the State also loses any ability to recover any of its health care costs from the non-compliant manufacturer.

There was no error in finding NWS had sufficient contacts with the State of Oklahoma for the court to exercise personal jurisdiction.

PROPOSITION II

CERTIORARI SHOULD BE DENIED ON THE INDIAN COMMERCE CLAUSE ISSUE.

A. Despite the Allegations of NWS, No "*Inter-Tribal Commerce*" Is Involved in the Case at Bar Because NWS Is Not Owned or Operated by an Indian Tribe. Instead, NWS Is Merely a Private Corporation Operating for Its Own Profit and Financial Gain.

NWS is not a Tribal enterprise. *See* ¶¶1-3 of Oklahoma's Second Amended Petition, Attached to Pet. at 50(a). It is nothing more than a private business that happens to be owned and operated for the individual profit of a man who claims to be a member of an Indian Tribe:

> ARTHUR MONTOUR, being duly sworn, deposes and says:
>
> 1. I am the President and *sole owner* of Defendant, Native Wholesale Supply ("NWS"). I am a Native American and member of the Seneca Nation.

¶1 of Affidavit of Arthur Montour Attached to Pet. at 65(a)-66(a) (emphasis added); *see also* ¶2 of Affidavit of Arthur Montour Attached to Pet. at 66(a). Despite this fact, NWS, in its Petition for Writ of Certiorari, erroneously refers to its transactions with Muscogee (Creek) Wholesale as being "*intertribal commerce*":

> [T]he Oklahoma Supreme Court held: (1) that Native Wholesale "is not clothed with tribal immunity"; and (2) "there is no blanket ban

> on state regulation of *intertribal commerce* even on a reservation."
>
> It is on this second issue, application of the Indian Commerce Clause to on reservation *intertribal commerce*, that the Oklahoma Supreme Court misapplied the Indian Commerce Clause and misinterpreted this Court's decisions addressing the scope of that constitutional provision.
>
> * * *
>
> Only Congress can regulate the right of *tribes* to engage in Indian commerce with other *tribes*. Here, the Oklahoma Supreme Court's decision sanctioning that State's lawsuit against Native Wholesale directly interferes with this congressional power, and unduly burdens Indian commerce, all in violation of the Indian Commerce Clause.

Pet. at 29 and 32 (emphasis added) (internal citations omitted). Accordingly, it is clear that NWS is incorrectly relying on nothing more than its owner's asserted Tribal membership[9] in the Seneca Nation in an

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[9] A corporation may only be considered to be entitled to the same attributes of sovereignty as those possessed by an Indian Tribe if the corporation is actually owned by the Tribe, controlled by the Tribe, and operated for governmental purposes of the Tribe:

> It is *possible* that a corporation owned by Indian shareholders *might* be immune from state taxation if it is *acting as an equivalent to the Indian tribe itself*. For example, a corporation has been held to be entitled to the same sovereign immunity as the Indian

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attempt to argue that he may operate a private business in an unlawful manner free from any and all State regulation. NWS is wrong.

Mr. Montour's claimed tribal membership in no way confers any type of sovereign status on the private business he operates for his own financial gain, as individual tribal members do not possess the attributes of sovereignty that an Indian Tribe does:

> The doctrine of sovereign immunity which was applied in *United States v. United States Fidelity & Guaranty Co.*, does *not* immunize the *individual members* of the Tribe.

Puyallup Tribe, Inc. v. Dept. of Game of State of Wash., 433 U.S. 165, 171-72 (1977) (emphasis added) (internal citation omitted). Specifically on this point,

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> Tribe when it is *organized under tribal laws; it is controlled by the Tribe; and it is operated for government purposes.*
>
> * * *
>
> But none of these conditions are present here and plaintiff concedes it is not acting as the Tribe's agent nor is it incorporated under the laws of the Tribe.

Baraga Products, Inc. v. Commissioner of Revenue, 971 F. Supp. 294, 296-97 (W.D.Mich.1997) (emphasis added) (internal citations omitted). NWS does not allege any of these factors in relation to the Seneca Nation of New York. Instead, NWS' assertion of Tribal status stems from the mere claim of its President and sole owner that he is a member of the Seneca Nation of New York. *See* ¶¶1-3 of Oklahoma's Second Amended Petition, Attached to Pet. at 50(a).

this Court has ruled that "Congress did not intend to make tribal members "super citizens" who could trade in a traditionally regulated substance free from all but self-imposed regulations." *Rice v. Rehner*, 463 U.S. 713, 734 (1983); *see also Squaxin Island Tribe v. State of Wash.*, 781 F.2d 715, 719-20 (9th Cir. 1986). Therefore, Mr. Montour cannot rely on his asserted tribal membership to seek some type of "super citizen" status to operate a business that engages in the trade of a traditionally regulated substance free from all but self-imposed regulation. This Court has already precluded NWS' argument. *See Rice*, 463 U.S. at 734; and *Squaxin Island Tribe*, 781 F.2d at 719-20. Simply put, Mr. Montour, as a mere Tribal member, does not possess the attributes of sovereignty held by an actual Indian Tribe. Therefore, it is axiomatic that Mr. Montour cannot confer a sovereign status onto NWS which he himself does not have. NWS is not a Tribal enterprise.

Even if tribal members did possess the sovereignty afforded to Indian Tribes, which they do not, Mr. Montour asserts that NWS is a *corporation*:

> 2. In or around 2001, NWS was chartered as a *corporation* by the Sac and Fox Tribe of Oklahoma.[10] I have been the President and

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[10] NWS does not allege that it is a Tribal enterprise of the Sac and Fox Nation. Instead, it merely states that it is incorporated by the Sac and Fox Nation. Mere businesses which pay licensing fees to a Tribe are not Tribal enterprises and stand in sharp contrast to cases involving economic entities established

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> sole owner of NWS since it was chartered. NWS' [sic] office has always been located on the Seneca Cattaraugus Indian Territory in Gowanda, New York.

¶2 of Affidavit of Arthur Montour Attached to Pet. at 66(a) (emphasis added). Since NWS is incorporated, it does not possess the same attributes as Mr. Montour because incorporated businesses are separate and distinct from their owners. It is "[a] basic tenet of American corporate law that [a] corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). A corporation and its owners and shareholders have differing rights and liabilities. *See id.* Due to the distinction between a corporation and its individual members and stockholders, an incorporated business entity cannot argue that it should be considered an enrolled member of an Indian Tribe simply because its sole shareholder is. *See Baraga Prds., Inc. v. Comm'r*, 971 F. Supp. 294, 296 (W.D.Mich.1977); *see also Ariz. Dept. of Revenue v. Blaze Constr. Co.*, 526 U.S. 32, 34 (1999). "[A] corporation is not an 'Indian' for purposes of immunity" from the application of state law. *Baraga Prds., Inc.*, 971 F. Supp. at 298. Therefore, even if Mr. Montour's claimed tribal membership somehow accorded him a "super citizen" status, which it does not, NWS would

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by the tribe and managed by the tribe for the benefit of the tribe. *See City of New York v. Golden Feather Smoke Shop, Inc.*, 2009 WL 705815 at *7 (E.D.N.Y.2009); *See also* ¶¶1-3 of Oklahoma's Second Amended Petition, Attached to NWS' Petition for Writ of Certiorari at 50(a).

not possess the same "super citizen" status because it and its President are separate and distinct from one another. Thus, while Mr. Montour might be a Tribal member of the Seneca Nation of New York, the separate and distinct corporate entity NWS is not. NWS is not a Tribal enterprise or an Indian.

There cannot be "*intertribal commerce*" without at least *two* Tribes involved. Since NWS is not a Tribe, a Tribal enterprise, or even an Indian, there were not *two* Indian Tribes involved in the subject transactions. Instead, the only commerce being regulated in this case was that of a private corporation engaging in business for its owner's unlawful profit and financial gain. Thus, the "*intertribal commerce*" issue raised by NWS is premised upon misstatements of fact, and law applied thereto. Since NWS is a private incorporated business entity, not a Tribal enterprise, or an Indian, the "*intertribal*" Indian Commerce Clause issue raised by NWS would not be at issue even if this Court accepted Certiorari. *See* U.S. Sup.Ct.R. 15.2. The Petition for Writ of Certiorari should be denied.

B. Even If NWS Was a Tribal Enterprise it Was *Not* Shipping and Selling the Subject Contraband Cigarettes to *Members* of the Seneca Nation. Therefore, the Petition for Certiorari Should Be Denied as this Court Has Already Ruled That There Is No Sovereign Interest Involved When a Tribe Sells Products to People Who Are *Not* Members of the Same Tribe.

Even if NWS was a Tribal enterprise, which it is not, there would be no sovereign interest involved in its illegal transactions because it would have been shipping and selling the contraband cigarettes at issue to *non-Seneca Tribal members*.

In the current case, NWS alleges that it was chartered as a corporation by the Sac and Fox Nation of Oklahoma. Even though it alleges to be chartered as a corporation by the Sac and Fox Nation, its President and sole owner is *not* a member of that Tribe. Instead, NWS' President and sole owner states that he is a member of the Seneca Nation.[11] Regardless of which Tribe NWS attempts to seek a strained affiliation with, NWS was *not* shipping and selling the contraband cigarettes at issue to the Seneca Nation, the Sac and Fox Nation, entities owned and/or operated

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[11] NWS has the burden of proving it is entitled to the protections of Indian sovereignty. Far from carrying this burden, NWS does not even clearly identify which Tribe's semi-sovereign status it is asserting. *See Golden Feather Smoke Shop, Inc.*, 2009 WL 705815 at *3-*4 (E.D.N.Y.2009).

by either Tribe, or members of either Tribe. Instead, NWS was shipping and selling the illegal cigarettes to an entity allegedly owned and operated by yet another *third and unrelated Tribe*, the Muscogee (Creek) Nation of Oklahoma, for eventual re-sale to the general non-tribal Oklahoma public at large who are also non-Senecas.

This Court settled the issue of state regulatory power over sales transactions involving *non-tribal members* in the case *Rice v. Rehner*, 463 U.S. 713 (1983). In that case, Ms. Rehner was a member of the Pala Indian Tribe and a licensed Indian Trader. Ms. Rehner was operating a general store on the Pala Tribe's Reservation in California. Ms. Rehner's general store was not owned or operated by the Pala Indian Tribe. Ms. Rehner's general store was selling liquor for off-premises consumption. California state law required Ms. Rehner to obtain a state liquor license. Ms. Rehner filed a declaratory judgment action asking the Court to rule that the doctrine of Indian Sovereignty pre-empted the State of California's regulatory authority over her general store. The *Rice* Court rejected Ms. Rehner's claims.

The *Rice* Court explicitly ruled that, in relation to her general store's sale of alcohol to *non-members* of the Pala Indian Tribe, *both* Ms. Rehner *and the Pala Tribe* were foreclosed from arguing that the doctrine of Tribal Sovereignty pre-empted state regulation in this area, even on Reservation land:

> *To the extent that Rehner seeks to sell* to non-Indians, or *to Indians who are not members of the tribe. . . . the decisions of this Court have already foreclosed Rehner's argument that the licensing requirements infringe upon tribal sovereignty.*
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> * * *
>
> *Regulation of sales to* non-Indians or *non-members of the Pala Tribe simply do not contravene the principle of tribal self-government*, and, *therefore, neither Rehner nor the Pala Tribe have any special interest that militates against state regulation in this case,* providing that Congress has not pre-empted such regulation.
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> * * *
>
> If there is any interest in tribal sovereignty implicated by imposition of California's alcoholic beverage regulation, it exists only insofar as the State attempts to regulate Rehner's sale of liquor to other *members of the Pala Tribe on the Pala reservation.*

Rice, 463 U.S. at 720, 720 n. 7, 721 (internal quotations omitted) (emphasis added); *see also Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512-13 (1991); *Duro v. Reina*, 495 U.S. 676, 686-87 (1990) ("We have held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination. . . . *But this rationale does not*

apply to taxation of nonmembers, even where they are Indians.") (emphasis added); and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 160-61 (1980) (State may "impose its taxes on [tribal sales to] Indians not members of the Tribe," because such "nonmembers are not constituents of the governing Tribe" and "stand on the same footing as non-Indians").[12]

In the case at bar, NWS is advancing the same flawed argument which this Court rightly rejected in *Rice* and the other cited cases. That is, NWS is attempting to indirectly assert the semi-sovereign status of the Seneca Nation of New York to make the

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[12] NWS cites a number of federal economic development statutes to support its flawed argument that Oklahoma's MSACA is pre-empted. *See* Pet. at 31-32. However, this Court has already ruled that in cigarette transactions:

> The federal statutes. . . . evidence to varying degrees a congressional concern with fostering tribal self-government and economic development, but none goes so far as to grant *tribal enterprises* selling goods to *non-members* an artificial competitive advantage over all other businesses in a State.

Colville, 447 U.S. at 155 (emphasis added). Thus, not even *actual Tribal enterprises* may rely on these economic development statutes to gain the artificial competitive advantage being sought by NWS. This applies with even more force in this case since *NWS is not a Tribal enterprise*. Moreover, the strong federal policy embodied in such laws as the Contraband Cigarette Trafficking Act, 18 U.S.C. §§2341 *et seq.*, and the Prevent All Cigarette Trafficking Act, Pub. L. No. 111-154, 124 Stat. 1087, is to *support* and *facilitate* state taxation and regulation of such sales, including by tribes and tribal retailers.

erroneous claim that Oklahoma's regulation of contraband cigarette sales to *non-Seneca members* somehow contravenes the principle of tribal self-government. However, as noted by the *Rice* Court, Tribal Sovereignty has no application in this case because *NWS is not shipping and selling the contraband cigarettes to members of the Tribe in which the President claims membership, nor is NWS shipping and selling the contraband cigarettes to members of the Tribe of NWS' incorporation. See Rice*, 463 U.S. at 720, 720 n. 7, 721. Therefore, even if NWS was a Tribal enterprise, which it is not, this Court has repeatedly rejected its argument. There is no sovereign interest involved when sales transactions involve members of a different Tribe. The Petition for Writ of Certiorari should be denied.

C. Despite the Allegations of NWS That Only "On Reservation" Activities Are Involved, NWS Shipped, Transported, and Sold the Subject Cigarettes Directly Into the State of Oklahoma, Far Beyond the Borders of the Seneca Nation Reservation. This Court Has Repeatedly Ruled That No Sovereign Interest Is Involved When "Off Reservation" Conduct Is Involved.

NWS suggests that it does nothing more than accept cigarette orders at its office allegedly located within the boundaries of the Seneca Nation Reservation. According to NWS' fallacious argument, after such orders are placed, it has no further involvement.

See Pet. at 29-33; *see also* ¶¶4-6 of Affidavit of Arthur Montour Attached to Pet. at 66(a)-67(a). Therefore, according to NWS, its action occurred entirely on the Seneca Nation Reservation. However, as outlined below, this statement is simply false. Accordingly, the Petition for Writ of Certiorari should also be denied because it is advancing misstatements of fact, and law applied thereto, concerning the *location and nature* of the activities complained of in Oklahoma's Second Amended Petition. *See* U.S. Sup.Ct.R. 15.2.[13]

In this case, NWS takes orders and imports cigarettes from Canada at its office allegedly located on the Seneca Nation Reservation in New York. NWS then arranges for the cigarettes to be shipped and sold to Muscogee (Creek) Wholesale in Okmulgee, Oklahoma for resale to non-tribal Oklahoma consumers. *See* ¶¶19-31 of Oklahoma's Second Amended Petition, Attached to Pet. at 58(a)-62(a). However, it must be *stressed* that in many instances, if not all instances, *the cigarettes sold, shipped and/or caused to be shipped by NWS never even pass through the Seneca Nation Reservation.* Instead, the cigarettes, after they pass customs, are stored in Nevada and/or Western New York – *not on the Seneca Nation Reservation. See* ¶¶3-5 of Affidavit of Arthur Montour Attached to Pet. at 66(a)-67(a). Furthermore, far from

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[13] As discussed above, NWS recently pled guilty to federal criminal obstruction-of-justice charges for having made virtually identical claims about its supposed lack of jurisdictional contacts with the State of Washington. *See* p. 3 n. 1 *supra*.

merely accepting unsolicited cigarette orders at its office, it was NWS that actually arranged for the *off reservation* shipment and transportation of the contraband cigarettes. As noted in Oklahoma's Second Amended Petition, shipping invoices have been obtained that show that it was NWS, not Muscogee (Creek) Wholesale, that paid for the transportation of the cigarettes into Oklahoma. *See* ¶¶19-22 of Oklahoma's Second Amended Petition, Attached to Pet. at 58(a)-59(a). Therefore, even if one were to take NWS' statements regarding the cigarette orders being accepted at its office as true, it still does not account for the shipping activities of NWS occurring *off* of the Seneca Nation Reservation and over Oklahoma roadways. The mere possession and transportation of these contraband cigarettes was, in and of itself, illegal.[14]

NWS is not merely shipping and transporting the contraband cigarettes. Instead, NWS is engaged in a calculated business plan to sell huge quantities of tax and escrow free contraband cigarettes to the general non-Indian Oklahoma public at large on and off the supposed Indian land of the Muscogee (Creek) Tribe of Oklahoma. *See* ¶¶19-31 of Oklahoma's Second

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[14] It shall be unlawful for a person to:

a. sell or distribute cigarettes, or

b. acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in the state in violation of the Master Settlement Agreement Complementary Act.

68 O.S. §360.7(E); *see also* 68 O.S. §360.7(B).

Amended Petition, Attached to Pet. at 58(a)-62(a). As alleged in the Second Amended Petition, NWS knew that the vast majority of the cigarettes that it was shipping to Muscogee (Creek) Wholesale were eventually being sold to the general non-Tribal Oklahoma public. This is clear when one considers the sparse population of Muscogee (Creek) Tribal members in the area compared to the sheer volume of cigarettes NWS was purposefully directing to Muscogee (Creek) Wholesale. *See* ¶¶25-26 of Oklahoma's Second Amended Petition, Attached to Pet. at 60(a)-61(a); *see also Muscogee (Creek) Nation v. Henry*, 2010 WL 1078438, *5-*6. NWS' deliberate business plan was to undercut other non-contraband cigarette sales made by legitimate cigarette retailers in the area by having its illegal cigarettes sold on Muscogee (Creek) Indian land free from state tax and escrow requirements. Moreover, in many instances, the contraband cigarettes were being shipped to locations in Oklahoma that were not even located on Muscogee (Creek) Indian land for eventual re-sale to the general public. *See* ¶¶18-23 of Oklahoma's Second Amended Petition, Attached to Pet. at 58(a)-60(a). Thus, despite the allegations in the Petition for Writ of Certiorari, NWS' activities *involve far more than accepting unsolicited cigarette orders and are occurring well beyond the borders of the Seneca Nation Reservation.*[15]

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[15] To the extent NWS might be asserting that it is a Tribal enterprise of the Sac and Fox Nation of Oklahoma, the same logic applies.

This Court held long ago that "[a]bsent express federal law to the contrary, Indians[16] going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973) (and collection of authorities cited therein). Therefore, even if NWS was a Tribal enterprise, or an Indian, neither of which is true, there would be no sovereign interest involved in this case because NWS was engaging in unlawful activity beyond the borders of the Seneca Nation Reservation subject to non-discriminatory State regulation. The Petition for Writ of Certiorari should be denied because it is advancing misstatements of fact, and law applied thereto, concerning the *nature and location* of the activities complained of in Oklahoma Second Amended Petition. *See* U.S. Sup.Ct.R. 15.2.

D. Despite the Allegations of NWS, this Lawsuit Is "Direct" Regulation of *Its* Unlawful Shipping and Sales Activity Occurring in Oklahoma. This Is Not, as NWS Puts it, "Indirect" Regulation of Out-of-State Tribal Purchases.

Finally, because it is clear that NWS is not a Tribal enterprise, that there is no sovereign interest

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[16] As noted earlier, NWS and its sole owner are separate and distinct. Thus, while Mr. Montour might be an Indian, NWS is not.

involved in the sale of goods to non-tribal members, and that there is no sovereign interest in unlawful activities occurring beyond Reservation boundaries, NWS attempts to shift this Court's focus away from its illegal conduct and onto the Muscogee (Creek) Tribe. In doing so, NWS incorrectly states that the purpose of the current lawsuit is to "indirectly" regulate the purportedly "out-of-state" purchases being made by Muscogee (Creek) Wholesale. *See* Pet. at 29-35. In advancing its flawed theory, NWS relies on case law interpreting the Indian Trader Statutes to assert the broad proposition that any and all application of Oklahoma law is pre-empted in regard to its unlawful shipping and sales activity merely because it is dealing with an alleged arm of the Muscogee (Creek) Tribe. As shown below, NWS' argument is wrong for at least *three* reasons.

First, to be an "Indian trader" a person is required to be appointed by the Commissioner of Indian Affairs and secure a license from same. *See* 25 U.S.C. §§261 and 262. In the lower Court proceedings, NWS produced no evidence as to its status as an "Indian trader," nor did it allege to be an "Indian trader." Thus, this is a new argument being advanced that is not properly considered on appeal. *See* U.S. Sup.Ct.R.'s 14.1(g)(I); 15.2; and 15.4.[17]

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[17] Oklahoma's response to these new arguments raised by NWS should not be construed as an admission that they are properly at issue. Oklahoma's response is done merely out of an

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Second, the cases cited by NWS lend no support to its flawed argument because such cases merely recognize the general principle that a State tax imposed on Indian traders' "on-reservation" transactions with a Tribe *may* be pre-empted by the Indian Trader Statutes if the tax's financial burden is ultimately passed on to the Tribe with which the trader was dealing. However, in this case, the MSACA does not impose a tax, or any type of financial obligation for that matter, on NWS. Since no financial obligation is imposed on NWS, it is clear that no financial obligation is passed on by NWS to Muscogee (Creek) Wholesale. Accordingly, the Indian Trader Statute cases cited by NWS are irrelevant. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95 (2005) (State motor fuel tax imposed on upstream distributor that ultimately delivered fuel to Tribal entity not pre-empted by Indian Trader Statutes because it imposed no financial burden on Tribe).

Third, the Indian Trader Statute cases cited by NWS dealt with the trade of goods, products, and/or services that were otherwise *legal* – such as tractors in *Central Machinery* and motor fuel in *Chickasaw Nation*. Conversely, in this case, the mere act of possessing the tax and escrow free contraband cigarettes in dispute is *illegal*. *See* 68 O.S. §360.7(E); *see also* 68 O.S. §360.7(B). Since the mere possession of the

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abundance of caution and in an attempt to make sure the Court is fully informed.

contraband cigarettes is *illegal*, the cases cited by NWS regarding the trade of *legal* goods, products, and/or services are inapposite. Moreover, this Court has already ruled that the Indian Trader Statutes do not pre-empt *any and all* State regulation of persons or entities trading with Tribes:

> Although *Moe* and *Colville* dealt . . . *directly* with claims of interference with tribal sovereignty, the reasoning of those decisions requires *rejection of the submission that 25 U.S.C. §261 bars any and all state imposed burdens on Indian traders.*

Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 74 (1994). Instead, it has already been determined that the Indian Trader Statutes do not bar the States from imposing *reasonable regulatory burdens* upon Indian traders. *See id.* at 74. *In fact, this Court has, on more than one occasion, held that States are free to regulate the activities of upstream wholesalers and distributors that are shipping and selling illegal cigarettes to Tribal entities. See Milhelm*, 512 U.S. at 71-75 (Indian Trader Statutes do not pre-empt State regulatory law imposing record keeping requirements and quota restrictions on number of tax free cigarettes upstream supplier and deliverer could ship and sell to Tribal entities); *Citizen Band Potawatomi Ind. Tr. of Okla.*, 498 U.S. at 514 (Sovereignty interests do not pre-empt State from regulating off reservation transportation and shipping of contraband cigarettes through seizures while contraband en route from upstream

wholesaler to Tribal entity); and *Colville*, 447 U.S. at 144-45, 144 n. 18, and 161-62 (Sovereignty interests do not pre-empt State from regulating transportation and shipping of contraband cigarettes purchased with Tribal funds through seizures while contraband en route from upstream out-of-state dealer that is licensed Indian Trader to in-state Tribe that eventually distributes illegal cigarettes to in-state on-reservation Tribal Outlets that are also operated by licensed Indian Traders acting as retailers for Tribe). In this case, just like in *Milhelm*, *Citizen Band Potawatomi*, and *Colville*, the MSACA is nothing more than a *reasonable regulatory burden* imposed on NWS to staunch the flow of *illegal* tax and escrow free contraband cigarettes to *non-tribal* consumers in Oklahoma. Under the *reasonable regulatory burdens* imposed by the MSACA, NWS remains free to sell whatever lawful product it wants, including cigarettes, to whoever it wants, at whatever price it desires, and in whatever amount. There is no need to re-visit the above-cited precedential rulings of this Court.

As described above, this lawsuit is not, as NWS puts it, "indirect" regulation of the Muscogee (Creek) Tribe. That is a misstatement of fact, and law applied thereto, concerning the *nature* of this lawsuit. *See* U.S. Sup.Ct.R. 15.2. Instead, this lawsuit is being brought against NWS, a private, non-Tribal enterprise, as a "*direct*" result of its unlawful shipping and sales activities occurring in Oklahoma. NWS may not assert the semi-sovereign status of the Seneca Nation in an attempt to free itself from reasonable regulatory

burdens merely because its President and sole owner alleges to be a member of that Tribe. This is particularly true since the facts of this case show that no sovereign interests would be involved even if NWS was actually a Tribal enterprise, which it is not. There was no "*intertribal commerce*."

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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